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In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

MARIA A. GREGORY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. NELA has participated as *amicus curiae* in numerous employment cases before the state and federal appellate courts as well as the United States Supreme Court. Recent cases before this court include *Pollard v. E.I. du Pont de Nemours & Co.*, No. 00-763 (U.S. June 4, 2001); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000); *West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906 (1999); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S. Ct. 2118 (1999); and *Haddle v. Garrison*, 525 U.S. 121, 119 S. Ct. 489 (1998). NELA has a compelling interest in ensuring that the goals of the Civil Service Reform Act of 1978 are fully realized. Because of the need for federal employees to be able to effectively challenge prior discipline before it can be used to enhance the penalty in subsequent disciplinary actions, NELA submits this brief to protect the interests of its members' clients by ensuring that they receive fair treatment by their employer, the United States Government.

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[1] Petitioner and Respondent have consented to the filing of this brief *amicus curiae*. The consents have been filed with the Clerk of this Court. No part of the attached brief has been authored by counsel for either party. No persons other than the *amicus curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify whether the Merit Systems Protection Board (MSPB) can rely upon prior disciplinary actions with pending grievances to enhance the penalty in a subsequent case. *Amicus* proposes that the Court accept the position of the Federal Circuit Court of Appeals prohibiting such consideration of ". . . prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Gregory v. United States Postal Serv.*, 212 F.3d 1296, 1300 (Fed. Cir. 2000). This requirement, which prohibits the MSPB, but not federal agencies, from continuing to rely upon challenged disciplinary actions, is in accord with the remedial purpose Congress intended when it passed the Civil Service Reform Act of 1978. The MSPB's prior position is also contrary to concepts of procedural due process and ". . . risk[s] harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Id.* at 1300.

Amicus suggests that the Court adopt the rationale enunciated by the Federal Circuit below that the MSPB abused its jurisdiction in relying upon prior actions that were the subject of ongoing grievance procedures. Therefore, the Board's determination that the penalty of removal was reasonable should be set aside. However, agencies can still rely upon prior discipline when taking the next action as long as they continue to process the prior grievances to arbitration. In the meanwhile, the employee should be able to hold in abeyance his appeal to the MSPB or the arbitrator on the subsequent adverse action. If a final decision is rendered in favor of the agency, it can then rely upon the prior action to enhance the penalty rather than placing the difficult burden on employees who have already been removed, demoted, or subjected to lengthy suspensions of 15

days or more. If the final decision is rendered on behalf of the employee, the agency will have a great incentive to settle to avoid having its penalty mitigated, thus reducing litigation. The increased burden will encourage federal agencies to expeditiously process the prior pending cases rather than delay the proceedings and then claim that the former employees are no longer covered by the grievance-arbitration procedures.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS BELOW WAS CORRECT IN FINDING THAT THE MSPB MAY NOT GIVE CONSIDERATION TO PRIOR DISCIPLINARY ACTIONS THAT ARE THE SUBJECT OF ONGOING PROCEEDINGS CHALLENGING THEIR MERITS.

The MSPB developed its theory that appellants only have a limited right to contest prior disciplinary actions in the case of *Bolling v. Dep't of the Air Force*, 9 M.S.P.R. 335 (1981). The Board distinguished between two types of situations. The first is where an employee was 1. previously informed of the action in writing, 2. was given an opportunity to dispute the merits of the action to a different authority, and 3. the action was made a matter of record—in that case the record of the prior disciplinary action will be reviewed and upheld ". . . unless, upon review, the agency or the Commission determines that the disciplinary action was unreasonable, arbitrary, or capricious." *Id.* at 339. This does not give the employee the right to ". . . 'hash over' the record of the past action in his hearing on the current action." *Id.* Alternatively, if the employee does not dispute the prior action, ". . . only the occurrence of that action need be verified." *Id.* Thus the practice of the former Civil Service Commission, predecessor to the Board, was ". . . to give a challenged past record a full, *de novo* review

if the three criteria were not met, but a limited review of the record if they were." *Id.*

The Board decided to follow the Commission's approach, noting that "[t]he Reform Act effected no substantive changes in the area of the proper review of challenged prior disciplinary actions," citing *Howard v. Dep't of the Army*, 6 M.S.P.R. 205, 205-07 (1981). *Id.* In determining that it struck the correct balance, the Board stated that ". . . an appellant is not allowed to relitigate issues that either were, or could have been, thoroughly litigated previously." *Id.* at 340. However, the Board's analysis is fundamentally flawed in two aspects: there is no requirement that the employee must have the prior disciplinary action reviewed by a different authority from the one that took the action, 5 U.S.C. § 7513; 5 C.F.R. § 752.404(c); and the employee is not allowed to thoroughly litigate prior disciplinary actions before they could be used as a basis to enhance the penalty in a subsequent case. *See Carr v. Dep't of the Air Force*, 10 M.S.P.R. 498, 500 (1982) (holding that a pending grievance only entitled employee to a determination ". . . of whether that action was 'clearly erroneous.'"); *accord, Jeffers v. Dep't of Veterans Affairs*, 40 M.S.P.R. 567, 570 n.4 (1989).

Moreover, "[r]are are the cases finding past discipline clearly erroneous as opposed to, for example, time barred." Peter B. Broida, *A Guide to Merit Systems Protection Board Law & Practice* 1540 (Dewey Publications 2001) [hereinafter *A Guide*]. Thus, notwithstanding the petitioner's reliance on the *Bolling* rule governing the consideration of prior disciplinary actions for providing adequate procedural safeguards, in practice it has not worked. Brief for the Petitioner at 29-30 [hereinafter Petitioner's Brief]. Furthermore, while employees are only entitled to limited review of the records of prior actions where all three criteria were met, the Board, in formulating its rule, still

referred to the fact that ". . . appellant did not grieve or otherwise contest any of the prior disciplinary actions . . . ." *Bolling*, 9 M.S.P.R. at 340. Nevertheless, the Board rejected Maria Gregory's petition for review below, ". . . holding that the penalty of removal was justified by Ms. Gregory's prior disciplinary record, part of which was the subject of then-current administrative proceedings." *Gregory*, 212 F.3d at 1298.

Therefore, the Board has been only giving lip service to the notion that federal employees are entitled to litigate prior disciplinary actions before that discipline could be used to support the enhanced penalty in a subsequent disciplinary action. The Federal Circuit properly addressed this inherent inconsistency in holding ". . . as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Id.* at 1300. The court went on to correctly note that "[t]o conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Id.* However, in *Blank v. Dep't of the Army*, 247 F.3d 1225 (Fed. Cir. 2001), the court held that the same principle does not apply to collateral challenges to disciplinary actions in discrimination cases pending before the Equal Employment Opportunity Commission (EEOC). Citing the need for finality, the court noted the possibility of long time delays in obtaining final EEOC decisions. This is a reasonable balancing of the equities between the need for expeditious discipline of federal employees and the fundamental fairness inherent in waiting for an independent determination of pending grievances before relying upon a prior disciplinary action.

The U.S. Postal Service argues that the Federal Circuit had no right to reverse the Board's decision below because:

> Both longstanding administrative practice and common sense support the MSPB's rule that agencies may consider an employee's disciplinary record—without regard to pending grievances—in calibrating the discipline for subsequent misconduct.

Petitioner's Brief at 11. *Amicus* concedes that there was a "longstanding administrative practice," but strongly disagrees that it was based on "common sense." As noted *supra,* the underlying rationale for the Board's administrative practice was fundamentally flawed. While the petitioner is correct that the Board can reopen an agency decision "after it has affirmed an agency decision relying upon that action," such a review is discretionary with the Board which has no obligation to reopen such a case, especially after a long period of time has elapsed. *See id.* at 12 (emphasis added); 5 C.F.R. § 1201.118. "There is little law on the effect of reversal of past discipline upon a currently sustained charge." Peter B. Broida, *A Guide* 1541 (2001). As a practical matter, it is very difficult to get the Board to grant petitions to reopen based on new evidence of reversals of past discipline, and only sophisticated employees or those represented by experienced counsel are likely to be even aware of such a procedure. "Compared to the number of cases annually decided by the Board through PFR, there are very few cases that are reopened under Section 1201.118." *Id.* at 984.

Amicus also concedes that recent disciplinary actions are relevant in determining the penalty for subsequent offenses. However, even though it is not at issue in this case, it strongly disagrees with petitioner that "[a]llowing federal agencies to consider an employee's disciplinary record—without regard to pending grievances—also promotes the merit system principles. 5 U.S.C. § 2301." Petitioner's Brief at 12. Rather, it is more analogous to punishing federal employees on the basis of conduct which

does not affect the performance of the employee or others, which is a prohibited personnel practice, if the disciplinary action were reversed by an arbitrator or the MSPB. 5 U.S.C. § 2302(b)(10). It should be noted that not only may prior suspensions be reviewed by arbitrators, but demotions or suspensions of 15 days or more may be appealed directly to the MSPB. 5 U.S.C. § 7121(e)(1); 5 U.S.C. § 7512. Likewise, as the grievance procedures offered by a collective bargaining agreement provide "sufficient procedural protection to employees suspended for 14 days or less," they should be allowed to run their course before the contested action can be relied upon to enhance a subsequent action. *McConnell v. Dep't of the Navy*, 9 M.S.P.R. 22, 25 (1981).

It is also correct that "[n]othing in the CSRA prevents an agency from considering prior disciplinary actions in deciding what discipline is appropriate, even when the prior actions remain subject to grievances." Petitioners' Brief at 13 (emphasis added). However, the court's decision below does not prevent agencies from considering prior disciplinary actions in assessing a penalty in a subsequent case—it only prevents the Board from doing so when there are outstanding grievances. While it is true some delay may occur before the Board can decide a case where there is an outstanding challenge to a prior disciplinary action, this is not an unreasonable price to pay in comparison to what happens when an employee is not allowed to complete such a challenge. He or she is removed, demoted, or receives a long suspension based upon prior contested actions which may never be reviewed by an independent arbitrator.

In fact, as in the instant case, the agency is likely to take the position that the grievant is no longer an agency employee and thus has no access to the negotiated grievance procedure under the collective bargaining agreement. Also, there is little incentive for a labor organization to arbitrate the grievances of those employees who have been removed

and are no longer union members. The labor organization, not the employee, determines which cases it will take to arbitration, and it is unlikely to pursue cases lacking in merit merely to protect employees from possible subsequent, more serious disciplinary actions. 5 U.S.C. § 7114(a)(5).

II. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE MSPB'S PRIOR RULE THAT AGENCIES MAY CONSIDER AN EMPLOYEE'S DISCIPLINARY RECORD WITHOUT REGARD TO PENDING GRIEVANCES WAS ARBITRARY AND CAPRICIOUS, OR OTHERWISE CONTRARY TO LAW.

Amicus contends that the MSPB's prior rule, which was invalidated by the court below, was arbitrary and capricious, or otherwise contrary to law. 5 U.S.C. § 7703(c). Therefore, the Federal Circuit's determination should be upheld by this Court as within the parameters of the scope of judicial review of MSPB decisions. In addition, the Federal Circuit's decision, contrary to the petitioner's claim, was motivated by the principle of procedural due process. In *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974), both the plurality and the concurring opinions found that it was not necessary for a federal employee to have a pre-decision hearing on the merits of his proposed removal before termination, as the opportunity to respond to the charges and the post-termination procedures were adequate to ensure procedural due process:

> Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by the administrative appeals procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.

Id. at 157 (post-termination hearing procedures provided by the Civil Service Commission and the OEO adequately protect those federal employees' liberty interest.); *id.* at 170 ("[a]fter removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated."); *id.* at 178 ("[t]he past cases of this Court uniformly indicate that some kind of hearing is required at some time before a person is finally deprived of his property interests."); *id.* at 179-180, 184-87.

Subsequently, *Arnett v. Kennedy, supra*, was amplified by this Court's landmark decision in *Loudermill v. Cleveland Bd. of Ed.*, 470 U.S. 532, 105 S. Ct. 1487 (1985). It was specifically noted that "[o]ur holding rests in part on the provisions in Ohio law for a full post-termination hearing." *Id.* at 546. The Court then concluded "that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute." *Id.* at 547-48. The due process afforded by the decisions in *Arnett* and *Loudermill* should be contrasted by the lack of due process afforded by the MSPB under its prior rule. Not only are previous disciplinary actions considered in enhancing the penalty in a subsequent case prior to a due process post-disciplinary action hearing, but in some cases, *e.g.*, suspensions of more than 14 days or demotions, the actions themselves entitle the employees to a post-disciplinary action MSPB or arbitration hearing. 5 U.S.C. § 7513; 5 U.S.C. § 7121.

Under the prior MSPB rule, an employee's opportunity to obtain a hearing on her previous disciplinary action(s) would be greatly circumscribed. Even if she were successful, the most that she could hope for is for the Board to reopen its final decision to mitigate the penalty. 5 C.F.R. § 1201.118. Such a truncated procedure does not comport with procedural due process for suspensions of 15 days or

more or demotions and provides little procedural protection for short suspensions and lesser disciplinary actions under the "clearly erroneous" standard of review mandated by the *Bolling* rule. Unlike the prior MSPB rule, the Federal Circuit's decision is not arbitrary or capricious, or contrary to law.

CONCLUSION

For the foregoing reasons stated in this brief, *Amicus* asks this Court to uphold the opinion of the lower court forbidding the MSPB to consider prior disciplinary actions when there are pending appeals or grievances.

Respectfully submitted,

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